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APPENDIX.

~~**VOLUME II.**~~

IN THE

Supreme Court of the United States

October Term, 1970

~~No. 1562~~ 70-117

CHARLES JOSEPH KASTIGAR and MICHAEL GOREAN STEWART,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petition for Certiorari Filed April 8, 1971

Certiorari Granted May 17, 1971

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Petition for Certiorari Filed April 8, 1971
Certiorari Granted May 17, 1971

In the United States District Court, Central District of California.

Honorable E. Avery Crary, Judge Presiding.

In the Matter of Michael Gorean Stewart and Charles Joseph Kastigar. No. 2649—Misc. and No. 2650—Misc.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California.

Date: Thursday, February 4, 1971, Thursday, February 11, 1971.

Virginia K. Wright, Official Reporter, 402 U.S. Courthouse, 312 North Spring Street, Los Angeles, California 90012. Telephone: 622-4041. [1]

APPEARANCES:

For the Plaintiff: Robert L. Meyer, United States Attorney. By: David R. Nissen, Assistant United States Attorney, 1265 U.S. Courthouse, 312 North Spring Street, Los Angeles, California 90012.

For Michael Gorean Stewart: Margolis, McTernan, Smith, Scope & Herring, By: Oliver Wendell Holmes, Jr., 3325 Wilshire Boulevard, Suite 901, Los Angeles, California 90005.

For Charles Joseph Kastigar: Hugh R. Manes, 3440 Wilshire Boulevard, Suite 608, Los Angeles, California 90005. [2]

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LOS ANGELES, CALIFORNIA, THURSDAY, FEBRUARY 4, 1971, 10:30 A.M.

THE CLERK: This is the matter in the matter of the Cool Grand Jury, your Honor. The roll has been called and indeed there are twenty members of the Grand Jury present, which constitutes a quorum.

MR. NISSEN: Good morning, your Honor. David Nissen for the United States, representing the Grand Jury this morning. And there has been a partial report presented by the Government. We move at this time the report and the indictments therein be received and filed, and that the defendants be admitted to release on their personal recognizance as requested.

THE COURT: Very well. The report is ordered filed together with the indictments. The defendants are to be placed on their personal recognizance, as indicated by the Grand Jury report.

When do you want the Grand Jury to return, Mr. Nissen?

MR. NISSEN: Your Honor, they are going back upstairs when this proceeding is over and continue the work of the day, but they have nothing to do until the next matter is completed, so if it is permissible with the court may they sit here while we take up the next matter or not? It is up to you. [4]

THE COURT: I have no objection, but I am afraid we are going to argue about things concerning witnesses and so forth, and I think maybe it is better they not be here.

MR. NISSEN: Fine. Would your Honor ask them then to return to the Grand Jury room from where they came?

THE COURT: All right. Would you be good enough, ladies and gentlemen, to go to the Grand Jury room from which you came this morning on the upper floors of this building.

(Whereupon, the Grand Jury retired from the courtroom, and the following proceedings were had in the absence of the Grand Jury:)

THE COURT: The matters of Charles Joseph Kastigar and Michael Gorean Stewart.

Counsel, will you please announce your appearance.

MR. MANES: Hugh Manes appearing for Mr. Charles Kastigar.

MR. HOLMES: Oliver Holmes for Michael Stewart, your Honor.

MR. NISSEN: David Nissen for the Government.

THE COURT: These are applications for immunity —[5]

MR. NISSEN: Yes, sir.

THE COURT: —filed by the United States Attorney. I understand there is opposition, is there?

MR. MANES: That is correct.

MR. HOLMES: That is correct.

THE COURT: All right. I will hear your arguments. There have been authorities submitted to me this morning just about two minutes ago. I haven't read that New York case. I am familiar with the Piccirillo and the cases cited in Piccirillo. One of you relies on one of those cases and the Government relies on Murphy and you rely on Counselman. I will be glad to hear your argument.

MR. MANES: Your Honor, may the record show that while I had some possible suspicion that immunity

might be inferred this morning or attempted, we did not know until we arrived this morning that it was, in fact, going to be attempted, so that I was unable to come prepared, and also because I am in trial, with a written memorandum of points and authorites.

I would ask leave of the court to furnish such written memorandum and I will be glad to do so, your Honor, because I think that what is involved here is rather substantial questions which Piccirillo we hoped would answer but, as your Honor knows, from having read that decision. [6] did not reach.

I would respectfully invite your Honor's attention to the dissenting opinion of Mr. Grant, not because a dissent prevails, but rather because it underscores the position of the respondent in this case.

With all due respect to the Government it appears, however, that their memorandum and particularly the last page of their memorandum does not correctly represent the holding of the two cases relied upon.

The fact is that Counselman v. Hitchcock, 142 U.S. 547 is and has been for the last 70 or more years the law of the land in sanctifying the right of a witness to invoke the self-incrimination clause of the Fifth Amendment, unless the immunity is coextensive with that Fifth Amendment privilege.

We respectfully submit, your Honor, that Section 6002 and 6003 do not meet the requirement of the test of Counselman v. Hitchcock. It does not meet that test and we have to assume, because most, if not all of the lawyers on the judiciary committees of the respective branches of Congress are familiar with Counselman. They are familiar with points that were raised in subsequent cases and must certainly have in-

tended to limit the scope of the immunity that is granted there.

To underscore that we cite Ullman v. United [7] States, 350 U.S. 422 where the court agreed with the Government, that immunity there against prosecution in any proceeding in any court conferred an immunity coextensive of the Fifth Amendment privilege.

Nevertheless, after Ullman was decided and, indeed, after Murphy v. Waterfront Commission was decided, the Supreme Court handed down another decision in Albertson v. SACB, a Securities Activities Control Board case.

THE COURT: 382 U.S.?

MR. MANES: I believe so, your Honor. In which again they held that the truncated immunity conferred upon the witnesses there under a statute quite similar to the one at bar is not sufficient and it was not coextensive with the Fifth Amendment, and therefore it cannot be—

THE COURT: What statute was that? A State statute?

MR. MANES: That was a federal statute, if I recall correctly, your Honor.

THE COURT: What statute are you talking about? What statute were they interpreting in that case?

MR. MANES: They were interpreting a federal statute which purported to grant immunity to witnesses testifying before the SACB.

THE COURT: You mean that is the old statute. [8] the one we have always used? Is that what you mean?

MR. MANES: It is an older statute. I don't know that it has been repealed yet, but my point is not whether it is an old or new statute but that the lan-

guage of the immunity that was before the court is quite substantially the same as it was here.

THE COURT: My understanding is that this quite limits the immunity, the new statute, it is not the same as the statute that was in effect before.

Is that right, Mr. Nissen?

MR. NISSEN: Yes, sir.

THE COURT: This statute limits the immunity to the use of the testimony, in effect, as distinguished from the transactional phase—

MR. MANES: As distinguished from forbidding prosecution of the witness who has testified.

What is the effect of that, your Honor? The effect is that—

THE COURT: I understand your argument. But all I am asking you now is, when you say the 382 decision interpreted a statute very similar to the one before us now, that is what I question, because I would like to know what statute that is.

This statute limits the immunity, the new statute, and the old statute didn't limit the immunity as it [9] does now.

MR. MANES: It doesn't. The old statute limited immunity that was before the SACB.

What I am saying, your Honor, was that the statute before the SACB was substantially the same type of statute as the one before your Honor.

THE COURT: Maybe so.

MR. MANES: It was a use statute rather than a transactional statute. That is, it did not forbid prosecution. It only forbid use.

THE COURT: All right.

MR. MANES: And what I am saying is that the court struck that down, and that was a year after Murphy was decided. There has been nothing in the history of court decisions since that time or, indeed, since Counselman v. Hitchcock that is in any way mitigated—the language of Counselman v. Hitchcock—in stating that any immunity less than that which infers immunity against prosecution is not sufficient.

I would add to that one further point, your Honor. One of the arguments that Judge Maffie makes, which is obvious from the nature of the problem, is that if a witness who testifies before the Grand Jury, under this court of immunity statute, is subsequently prosecuted for the offense about which he or she has been questioned, he has the [10] burden of showing that that prosecution and the evidence introduced against him was tainted in some way by leads furnished from his testimony.

How does an individual defendant go about proving that the Government is relying upon evidence that is tainted, particularly where Grand Jury transcripts are not available to him, particularly where he is barred from relying on later transaction that may have occurred in a Grand Jury secret proceeding, and for other reasons that I think must be apparent to the court.

So I am saying, your Honor, the Government's attempted offer of immunity will not help Mr. Kastigar. He must invoke the Fifth Amendment because there is no immunity either offered or authorized which can prevent him from being prosecuted for the offense which is the subject of this proceeding.

I have some other objections, too, your Honor. Under this immunity statute the law seems to say that when the Government has or seeks an order of immunity that a court has a duty, it says it shall issue the order.

Now, I cannot believe that the Congress has created a court to serve merely as a conduit for the actions of the Attorney General or the United States Attorney. Nor could I believe that would be a constitutional invasion of the [11] judicial branch of the Government.

As a matter of fact, it is to be noted that Judge Motley in her decision dealt there—her conclusion was that the order could not be issued and she refused to issue the order, notwithstanding the language at bar.

But what even is more significant or at least as significant to me is the fact that just as the Government may seek search warrants from this court from time to time, or from any court, and must be compelled to show reasonable cause for the issuance of a search warrant, in order for an invasion of privacy to be countenanced, and just as the Fourth and Fifth Amendments are intertwined, as held in Boyd v. United States, and reaffirmed in many decisions of the United States Supreme Court.

So I would believe it would be the duty of this court to demand from the Government some information, other than a mere conclusion, that the reasons for seeking testimony from a witness such as Mr. Kastigar is justified even under the law, assuming it to be otherwise valid.

Now, I know from the copy which the Government furnished me of its proposed order and its alleged

affidavits showing some reason therefor, that the reasons offered under the affidavit signed by Mr. Meyer that in—he says, "In my judgment the testimony of Charles Kastigar [12] sought is necessary to the public interest and material to the investigation now being conducted by the Grand Jury." That the Grand Jury is presently inquiring into alleged violations of laws of the United States, without specifying what law, what the scope of the inquiry is. There hasn't been any notice given either to me or to the witness, Mr. Kastigar, as to the scope of inquiry, the nature of the inquiry, the purpose of the inquiry.

He has no way of knowing what questions he must respond to as being material and what ones he would be privileged not to respond to, and so forth.

And finally the Government, Mr. Meyer, says, "On September 9 Mr. Kastigar appeared before the Grand Jury and invoked the constitutional privilege against self-incrimination and refused to answer." But I have—I obviously was not present at that time. I concede I was his counsel at that time but I was not present, of course. In fact, I was engaged in trial at the time.

I would respectfully submit I have no knowledge as to the precise questions that were asked of Mr. Kastigar. I was not furnished nor am I, according to Mr. Nissen, to be furnished with a list of—

THE COURT: Didn't he tell you what the questions were?

MR. MANES: Mr. Nissen has not. [13]

THE COURT: No. Your client.

MR. MANES: He did at the time, your Honor, he wrote down his recollection of some of the questions. But that was in September and we are now in February

and I did not retain them because he was excused. I did not realize that we were going to be confronted with this again.

I assume that Mr. Kastigar would be, since the immunity statute was not in effect at that time—not this one—and since there was no immunity statute in effect at that time applicable to Selective Service matters, at least, I would assume they were going to ask him those questions again.

THE COURT: There is no question in your mind, he is going to demand and request immunity.

MR. MANES: He is going to demand—excuse me. You mean that the Government is going to demand it?

THE COURT: Your client is going to demand immunity.

MR. MANES: He is going to demand immunity from prosecution, which the Government cannot furnish him.

THE COURT: Yes, he is going to demand immunity.

MR. MANES: From prosecution.

THE COURT: I know that is what you are demanding, and the Government is willing to give him immunity under the new statute. So that is where we are at loggerheads. [14]

But what they ask him really isn't too material now, is it, because he is going to demand immunity regardless of what they ask him.

MR. MANES: Well, I am trying to point out, however, your Honor, that the affidavit is defective for a number of different reasons, in that essentially it does not show reasonable cause. It does not produce facts.

THE COURT: What does the statute say as to what the affidavit is to show?

MR. MANES: Well, the affidavit—the statute appears to suggest that this must be the showing made, that the Government or that the Attorney General has given permission to the United States Attorney, who seeks the order, that the United States Attorney must in his judgment—or may proceed if in his judgment—

THE COURT: That is what I—

MR. MANES: But I think there has to be some due process under the Fifth Amendment to avoid unnecessary invasions of privacy of an individual.

How do you do that but to allow the court even in camera to pass upon whether this is a relevant matter, whether there is reasonable cause to defer the immunity or, indeed, even to question Mr. Kastigar.

There are no facts here, just conclusions by the United States Attorney as to this matter. And that [15] is what I am attacking here, is the affidavit as lacking those essentials which are requisite in all Fourth Amendment cases. And I am attacking it on the basis that the court has time and again required, before an authorized invasion can be constitutionally protected, there has to be reasonable cause shown.

Finally, I want to ask the court at this time when the Grand Jury, the present one, the one that is now in existence, when that came to being. May I inquire of the court on that?

THE COURT: The clerk will have to tell you.

THE CLERK: Your Honor, the Cool Grand Jury was impaneled on September 22, 1970.

MR. MANES: September 22, 1970?

THE CLERK: That is correct, counsel.

MR. MANES: And that is the present jury that is still in existence, is that right?

THE COURT: That is the jury before whom, evidently, your client will be called—

MR. MANES: I would say, your Honor, that since Mr. Kastigar has appeared before The Grand Jury September 9, 1970, that his subpoena before this Grand Jury is invalid. That is, his order to—excuse me. Let me withdraw that.

There was a subpoena. But this proceeding [16] is invalid until such time as he has appeared before the Grand Jury and been questioned on those matters which the Government is seeking information.

I would say that since this is the Grand Jury that has come into being since his last appearance that it would be improper for the Government to rely on his past appearance before another Grand Jury to proceed in the fashion that it is.

THE COURT: The clerk tells me he was in error. It was August 21st that they were impaneled?

THE CLERK: That is correct, your Honor, 1970.

THE COURT: Did he appear before that same Grand Jury before, can you tell that?

MR. NISSEN: No, sir, he did not.

THE COURT: He did not.

MR. NISSEN: That jury has expired, to my recollection.

THE COURT: All right. Anything further?

MR. MANES: May I just get one point clear, your Honor?

THE COURT: Yes.

MR. MANES: Am I correct in assuming that this is a new Grand Jury then? [17]

THE COURT: Yes, it is not the Grand Jury—

MR. NISSEN: This Grand Jury has never had Mr. Kastigar before it except this morning.

MR. MANES: I think that the law would require that Mr. Kastigar appear before it, before this newly constituted Grand Jury, before this proceeding may be undertaken, if the court please.

I would like some clarification at least for the record, your Honor, as to whether the old Grand Jury was permanently discharged or whether it was merely excused sine die or some other fashion. May that be clarified for the record?

THE COURT: Does it show?

MR. NISSEN: I do not know, your Honor, and I do not think it is material.

THE COURT: It doesn't show whether they were discharged or not?

THE CLERK: No, your Honor.

THE COURT: Where would that record be?

THE CLERK: That would be in the jury clerk's office on the fifth floor of this building.

THE COURT: All right. Go ahead.

MR. MANES: If it please the court, may those records or the information therefrom be obtained so I may complete the record prior to this point. [18]

TE COURT: Can you go up and get them?

THE CLERK: Yes, your Honor.

THE COURT: All right. Anything further now?

MR. MANES: No, your Honor, that completes my presentation, except I would like to please have an opportunity to prepare a memorandum in writing for the court on several points that we have urged.

I think that the issue here is quite a substantial one, and since one federal court has already upheld the position of Mr. Kastigar in this regard, I think it might be worth a little deliberation and consideration

and the opportunity to present your Honor with opposing point of view. We did not really have the opportunity the Government did to present this memorandum.

THE COURT: All right. Counsel, now, for Mr. Stewart.

MR. HOLMES: Yes, your Honor, I, of course, adopt all the substantive matters that Mr. Manes has raised.

THE COURT: Yes.

MR. HOLMES: However, I would like to direct my attention particularly to the procedural matters involved here. We did not have any notice or any reason to believe that Mr. Stewart would be brought before this court and in application for immunity made before this [19] morning when we were so informed.

I didn't have an opportunity, as Mr. Manes did not, to prepare any papers in this matter, but I would request the court to consider the case of In re Phillip Bart, 304 F. 2d 631. That case has been held in this Circuit, your Honor, to be the leading case with respect to procedural requirements for application for immunity under the old immunity statute, not the one that is involved here. However, I believe the procedural questions involved there are certainly analogous, if not identical.

According to the Bart case we are entitled to notice as provided in Rule 6(b) of the Federal Rules of Civil Procedure. We have not received that notice, and I would request, therefore, your Honor, the court's consideration of the Government's application with respect to Mr. Stewart, at any rate, be deferred for the period specified in that rule.

THE COURT: That is a five-day notice, isn't it?

MR. HOLMES: That is correct.

THE COURT: Isn't there something, that the judge can give lesser notice, as I recall?

MR. HOLMES: I believe on a showing of good cause, your Honor, the court does have the discretion to [20] adjust that period to some lesser time. I don't believe any showing has been made in this case.

THE COURT: All right. Go ahead.

MR. HOLMES: Moreover, your Honor, I would address myself to a point that Mr. Manes raised, namely, that the application for immunity gives some notice of the subject matter of inquiry, the nature of the Grand Jury investigation. All these requirements are set out in the Bart case. Although the statutes are different, certainly the considerations are very analogous.

If no such requirement is made, then there is absolutely no judicial function to be played here, except the mere signing of an order. And as Mr. Manes pointed out it is inconceivable that we could be required to come before this court, an application be made to the court and the court have absolutely nothing to consider but the conclusionary representations of the Government.

Further, I would like to state, as Mr. Manes stated, that we rely heavily on the case of In the Matter of the Grand Jury Testimony of Jo Anne Kinoy, a New York District Court decision.

THE COURT: Somebody has furnished me with a copy of that opinion.

MR. HOLMES: Very well. That will complete my presentation, your Honor. I am unable to make a more [21] thorough presentation at this time because I have had absolutely no notice, no opportunity to prepare.

I request that this matter be stayed, that the application of the Government be considered according to the notice requirements of Rule 6(b).

MR. MANES: May I, your Honor, on behalf of Mr. Kastigar join in that request, and reliance upon the Bart decision, of course.

THE COURT: All right. Mr. Nissen.

MR. NISSEN: With regard to counsel's argument that the statute is unconstitutional, the Constitution clearly says that no person in a criminal case shall be compelled to be a witness against himself.

The statute here says that the testimony shall not be used against him directly or indirectly. In other words, not his testimony or any leads therefrom.

Counsel for Mr. Kastigar raises the specter—and I have not read Judge Motley's—but if the judge said what he says she said the witness would have the burden of showing that the testimony was tainted. Of course, that is utter nonsense. The courts here routinely require the Government to show that testimony is not tainted. I think the judge there was looking for an out and not looking at the Constitution.

The two cases cited in our memorandum obviously [22] do not pass upon this statute because the statute became effective December 15, 1970. However, those two cases are the basis upon which the statute was enacted, because they say complete immunity from future prosecution—or they indicate it would not be essential. All that is essential is that it be coextensive with the witness' purpose against him. This is what the statute does.

Now, Mr. Manes says the statute makes this court ministerial in its function. He wants the court to find

out how come this is necessary, what the facts are, the scope of the inquiry, the nature and purpose, and so forth. The statute makes it very plain that the court's function is ministerial. The court is not informed and cannot be as informed as the Grand Jury or the U.S. Attorney, unless the court would sit with us to do our work, and the court simply doesn't have that responsibility nor the time.

Mr. Manes says the affidavit is defective because it doesn't produce facts. Well, this court in the Ninth Circuit has written an opinion in the case involving Nicolo Licata, L-i-c-a-t-a. That opinion was vacated by the Supreme Court on the ground that the issue had become moot by virtue of the Grand Jury's expiration before the case was docketed in the Supreme Court. But the force of the Licata opinion is still 100 percent effective. It's the thinking of the Ninth Circuit on the immunity statute. [23]

All these objections were raised. The affidavit doesn't tell the facts.

THE COURT: What is that case?

MR. NISSEN: It is In re Nicolo Licata, Li-c-a-t-a. It was in slip opinion only the last time I saw it. It may now have gotten into the Fed. Reporter system in 1970 very late, if it is published yet at all.

THE COURT: Spell the name, would you, please?

MR. NISSEN: N-i-c-o-l-o.

THE COURT: In re Nicolo Licata?

MR. NISSEN: Yes, L-i-c-a-t-a.

THE COURT: You said it came down in December?

MR. NISSEN: In the last month or two of the year.

THE COURT: You don't have the date?

MR. NISSEN: No.

THE COURT: You don't have the slip opinion?

MR. NISSEN: I didn't bring the slip with me. It is in my Licata file.

In that case all the issues raised here, the notice provisions, the In re Bart argument and all the rest are raised, In re Bart has nothing to do with this type of statute. It has to do with an immunity statute relating to national security, where the judge has to make [24] the finding that it affects national security. Here Congress has given the court no function at all. The Licata case says it is ministerial, it is ex parte. We can get an immunity order without their even being here and then your Honor could order them to answer with them being present and hold them in contempt if they didn't.

I might say with regard to Mr. Manes' argument that this is a different Grand Jury than that which Mr. Kastigar appeared before. We acknowledge that and merely point out that the statute says only that he either has taken his privilege—in other words, that he has either taken the Fifth Amendment, or that he is likely to do so. The precise language is as follows, "such individual has refused or is likely to refuse to testify or provide other information . . ."

THE COURT: Is the subject of the inquiry the same as the inquiry in September?

MR. NISSEN: Yes, sir. That is not an issue, but it is.

THE COURT: It is not an issue but they are complaining about it, they don't even know what—

MR. NISSEN: No witness is entitled to know what the Grand Jury is doing, your Honor, whether they are being sought to be compelled for immunity or because they just want to know before they go in. They don't

[25] have that right. If they did they would be sitting as the 24th member of the Grand Jury.

THE COURT: He says they are entitled to know what the nature of the inquiry is.

MR. NISSEN: Why are they so entitled?

THE COURT: You wouldn't be coming in with the motion unless you had some reason to think that they were going to allege the Fifth Amendment or set up the Fifth Amendment as a defense to testifying.

MR. NISSEN: That is true, your Honor.

THE COURT: So you have to base that on something. I think they are entitled to know what you are basing it on.

You are basing it on the questions asked in September.

MR. NISSEN: We are basing it on the fact he has been asked and he did take the Fifth Amendment, which is all the statute requires. But he doesn't have to. It is just the fact that he is likely to. Both of them have—

THE COURT: I understand that.

MR. NISSEN: Yes.

THE COURT: They know the nature of the inquiry because the inquiry has already been made and they have said they were going to take the Fifth. [26]

MR. NISSEN: Your Honor, they know they have taken the Fifth, but I don't know that they know the nature of the inquiry. They are not entitled to.

THE COURT: I know, but they know the questions that were asked them.

MR. NISSEN: Well, certainly, they know the questions.

THE COURT: Yes. That is what I am talking about.

MR. NISSEN: But whether that tells them the nature of the inquiry or not, I couldn't say.

THE COURT: That is what I had in mind, when I said the nature of the inquiry, I meant the questions that they had been asked. They know the questions that they have been asked.

MR. NISSEN: Yes.

THE COURT: What about this notice he talks about?

MR. NISSEN: Your Honor, the case In re Bart is not the leading case on notice. That case is dead wrong on notice, and the Licata case, counsel for Licata made just that complaint, "We didn't get the civil notice." It is not a civil case.

No. 2, the Licata case says they don't get the civil notice, they are not entitled to it. [27]

No. 3, I would like to hear from counsel what is it that they need five days' notice for? We didn't even know that Mr. Stewart was going to take the Fifth until he showed up this morning. If he needs five days for something it is not apparent to us.

All we are saying is if the statute authorizes it you can be required to answer and it can't hurt you. What that takes five days for is a mystery and they weren't able to tell you. They would like five days to put something in writing that they have already said here. But the Licata case simply holds that this is not a requirement.

THE COURT: All right. Anything further?

MR. NISSEN: No, your Honor.

THE COURT: This is a new statute and I think I should take a little time to review these authorities.

MR. NISSEN: Yes, sir, it is a new statute.

THE COURT: I would propose to put this over until tomorrow to give me an opportunity to read these authorities.

MR. NISSEN: If your Honor wishes to have time to do that. What I would like your Honor to do is to put it over for a week so that the Grand Jury would be in session and we could—or put this matter over until tomorrow and then have the witnesses ordered back next week so that we don't have to bring the Grand Jury in [28] tomorrow. They are not planning on it.

THE COURT: I see. Well, let's put this matter over until tomorrow and then I can have an opportunity and counsel can have an opportunity to read these authorities.

MR. MANES: Your Honor, —

THE COURT: Yes.

MR. MANES: Excuse me for interrupting your Honor, but in view of the fact that the Government has indicated that the Grand Jury is not to return until next Thursday I wanted to indicate to the court that I have been and am now engaged in a trial in the State court in Department 40. The court was kind enough to let me off this morning so I might make this appearance here.

I would ask the court if the court would be good enough to put this matter over until Thursday, that is, this coming Thursday, a week from today.

THE COURT: You see, I have problems, too. I am going to be on trial.

MR. MANES: There is another reason for it, Judge.

THE COURT: I am going to decide this before that.

MR. MANES: All right.

THE COURT: You don't have to be here. You [29] have presented your authorities, and all. The only reason I am hesitating now is that I want to read them.

MR. MANES: Yes, your Honor.

THE COURT: I know what some of these cases hold, but I want to read them and I want to be fair about it.

MR. MANES: Judge, if your Honor wishes to make a decision before Thursday of next week, may we respectfully request that the matter be put over until Wednesday? That will also have the additional benefit of enabling us to work over the weekend to prepare additional authorities, should we find any, to submit to you by Monday or Tuesday.

THE COURT: I have no objection to putting it over. I can put it over until Wednesday. I have cases set, of course, for next week. I think Wednesday I could hear it.

MR. NISSEN: I can't be here Wednesday at all. I will be absent from the building all day Wednesday.

THE COURT: You have cited everything you have in mind that you want me to consider?

MR. NISSEN: Yes, sir.

THE COURT: If you can't be here Wednesday, I can rule on it—I will rule on it Thursday but I won't hear any more argument on Thursday. You can file whatever [30] you want by Tuesday and I will rule on it on Thursday, if you want to handle it that way.

MR. MANES: May I consult with my colleague, your Honor?

THE COURT: Yes. But there will be no more argument about it, other than what you file.

I would rather rule on it before, much prefer to. I will be in a position to rule on it before.

What about Tuesday?

MR. NISSEN: Monday or Tuesday.

MR. HOLMES: Thursday would be satisfactory without additional authorities.

THE COURT: I understand it would be, counsel, but I have a trial on Thursday and I am going to be very busily engaged on Thursday.

If it were an emergency and came down on Thursday I would have to do something about it, but it isn't now, because we have a whole week here.

MR. HOLMES: Yes, your Honor.

THE COURT: I am giving you an opportunity. I can hear it tomorrow, but counsel has problems because he is on trial. I want to adjust and be as reasonable as I can be, but everybody has problems and so does the court. I can't do it next Thursday, I can't devote the time to it next Thursday. [31]

MR. HOLMES: I was just going to suggest, your Honor, that we don't anticipate any additional argument on our part.

MR. MANES: We would be willing to submit the additional authorities.

MR. HOLMES: And have a ruling at a time that is convenient with the court.

THE COURT: Then file your additional authorities.

Mr. Nissen, would you give me the date this Licata case was decided?

MR. NISSEN: I will give you the date and number, your Honor, right away.

THE COURT: I don't care about the number, but I want the date of the slip sheet. Then I can find it.

MR. MANES: Your Honor, may I say a word about the Licata case?

THE COURT: Yes.

MR. MANES: It is brand new to me, too, as it is to your Honor.

THE COURT: Surely.

MR. MANES: But just from what counsel has indicated about it, may I respectfully suggest, your Honor, it is not authority in this Circuit where it appears it was held moot by the United States Supreme Court. There has [32] been no opportunity, therefore, to review that decision, and I just have some—

THE COURT: What do you mean it is moot, it is held to be moot?

MR. MANES: I am relying on counsel's indication. I thought I understood him to say that it went up to the United States Supreme Court and was denied for mootness. I may be in error—

MR. NISSEN: Moot because the Grand Jury had been discharged by that time.

MR. MANES: So if that is so, I question the validity of it.

THE COURT: It would still be the authority in this Circuit. So far as the Ninth Circuit Court of Appeals, they have ruled and the only reason this rule hasn't gone into effect is because the Grand Jury has been dismissed, so as far as I am concerned that would still be the rule of the Ninth Circuit, it seems to me.

MR. HOLMES: Your Honor, with respect to counsel's point that the Licata case represents the thinking of the Ninth Circuit, with respect to notice, I would like to read to the court from a decision dated January 18, 1971. That is the case of United States of America v. Lee Wineberg, et al. Several other cases were consolidated with it. [33]

THE COURT: Yes, I remember that.

MR. NISSEN: I think that case has the cite to Licata in it, too.

THE COURT: There are two Wineberg cases. One of them was the release on bond, as I recall.

MR. NISSEN: Yes.

THE COURT: Then there was the decision—

MR. NISSEN: Yes.

THE COURT: —deciding the case.

Now, which one are you talking about?

MR. HOLMES: I am talking about the decision deciding the case. It is No. 26903.

THE COURT: January 18, 1971?

MR. HOLMES: Yes. The Ninth Circuit in that case held as follows:

> "The leading case prescribing the proceeding to be followed in proceedings under 18 USC 2514 for granting of immunity and directing of a witness to answer questions before the Grand Jury was In re Bart, 304 F. 2d 631, D.C. Circuit 1962."

They cite the Licata case and simply state that it was vacated as moot. The Licata citation is 429 F. 2d 1177. It unequivocally states that—

THE COURT: That isn't the one that was [34] cited late in December, is it?

MR. NISSEN: That is the case I was referring to.

THE COURT: 429 F. 2d 1177.

MR. HOLMES: That is correct, your Honor. They leave no question, your Honor, that the thinking of the Ninth Circuit is that the procedural requirements are those set out in In re Bart.

THE COURT: You are going to get your five days now because it isn't going to be heard until next Thursday. For a ruling on this, let's set it for 9:00 o'clock next Thursday.

MR. MANES: Yes, your Honor. May the respondent witness Mr. Kastigar—he does not have to return until that date, is that my understanding?

THE COURT: Yes, that is my understanding. Is that when you want them to return, Mr. Nissen?

MR. NISSEN: Yes, sir. Will the court order both Mr. Kastigar and Mr. Stewart to return at 9:30 on next Thursday?

THE COURT: Yes.

MR. MANES: The court said 9:00 o'clock.

MR. NISSEN: 9:30 for the Grand Jury. I think they had better be here to be ordered to answer, your Honor. [35]

THE COURT: Yes. Mr. Kastigar—

MR. KASTIGAR: Right here.

THE COURT: And Mr. Stewart—

MR. STEWART: Right here.

THE COURT: You gentlemen are ordered now to return to this courtroom at 9:00 a.m. on next Thursday. That is a week from today and that is February 11th, at 9:00 o'clock. Be sure and be here at 9:00. Let's not have any misunderstanding about it. Everybody, counsel and all, 9:00 o'clock, because I am going to be very busily engaged at 9:30.

If either side wants to file any more authorities, file them so they are delivered and filed here in court not later than 12:00 o'clock noon on Tuesday. Not later than 12:00 o'clock noon on Tuesday. And either side or both can file any further authorities you want. Be sure they are filed not later than 12:00 o'clock Tuesday.

MR. MANES: Your Honor, just one thing more. The clerk, I thought, was going to ascertain—

THE COURT: Yes. What did you find?

MR. CLERK: Your Honor, without the knowledge from Mr. Nissen which Grand Jury it is, I cannot obtain that information. He does not have it available at the present time.

THE COURT: You don't know the name of the [36] Grand Jury?

MR. NISSEN: We had fourteen Grand Juries at that time and I couldn't tell you from recollection which one it was.

THE COURT: You can't ascertain that?

MR. NISSEN: I can ascertain it, yes.

THE COURT: Ascertain it and call Mr. Manes.

MR. NISSEN: Perhaps I can inform him when I see him here again.

THE COURT: When?

MR. NISSEN: When I see him here again, which would be next Thursday.

MR. MANES: Well, I would like to know before that, though.

THE COURT: He wants to know before.

MR. MANES: So I can—

THE COURT: If you can tell the clerk of the date that the Grand Jury before whom Mr. —

MR. NISSEN: I know the date. It was September 9th.

THE COURT: I know, but you don't know which Grand Jury it was, so you don't know whether they were dismissed or what terminated their service, how it was terminated.

Isn't that what you are interested in?

MR. MANES: Yes, your Honor. [37]

MR. NISSEN: I am not even 100 percent sure it was terminated, but I just assume that it was. I don't know.

THE COURT: There will be no problem that I can see in giving him the information.

MR. NISSEN: I see no relevance—

THE COURT: There may not be. I am not going to determine that. But give him the information or give it to the clerk and I am asking the clerk to call Mr. Manes and give him that information.

You know what information it is?

THE CLERK: Yes, sir.

THE COURT: He wants to know whether that Grand Jury, before whom Mr. Kastigar appeared, has been terminated, and if so, in what manner its services were terminated.

THE CLERK: Yes, sir.

THE COURT: All right.

MR. MANES: Thank you, your Honor.

THE COURT: 9:00 o'clock next Thursday, February 11th.

(Whereupon, at 11:25 o'clock a.m., Thursday, February 4, 1971, an adjournment was taken until 9:00 o'clock a.m., Thursday, February 11, 1971.) [38]

In the United States District Court, Central District of California.

Honorable E. Avery Crary, Judge Presiding.

In the Matter of Michael Gorean Stewart and Charles Joseph Kastigar. No. 2649-Misc. and No. 2650-Misc.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California.

Date: Thursday, February 11, 1971.

Virginia K. Wright, Official Reporter. [39]

APPEARANCES:

For the Plaintiff: Robert L. Meyer, United States Attorney, By: David R. Nissen, Assistant United States Attorney, 1265 U.S. Courthouse, 312 North Spring Street, Los Angeles, California 90012.

For Michael Gorean Stewart: Margolis, McTernan, Smith, Scope & Herring, By: Oliver Wendell Holmes, Jr., 3325 Wilshire Boulevard, Suite 901, Los Angeles, California 90005.

For Charles Joseph Kastigar: Hugh R. Manes, 3440 Wilshire Boulevard, State 608, Los Angeles 90005. [40]

LOS ANGELES, CALIFORNIA, THURSDAY, FEBRUARY 11, 1971, 9:00 A.M.

THE CLERK: This is Case No. 2650-Miscellaneous Criminal and Case No. 2649-Miscellaneous Criminal, In the Matter of the Testimony of Michael Gorean Stewart and Charles Joseph Kastigar.

Counsel, please announce your appearance.

MR. NISSEN: David Nissen for the United States, your Honor.

MR. HOLMES: Oliver Holmes for Michael Stewart.

MR. MANES: Hugh Manes appearing for Mr. Kastigar.

THE COURT: Very well, gentlemen, I have read Mr. Manes' authorities and the cases cited by the Government.

The issue, it seems to me, is, does the witness incriminate himself if his testimony could not be used directly or indirectly against him.

The Fifth Amendment, as we know, provides that a person shall not in a criminal case be compelled to be a witness against himself.

So if the witness testifies, does he incriminate himself by that testimony, if his testimony cannot be used against him either directly or indirectly. [41]

The cases divided on the question of whether the stautes, with provisions similar to those in the Organized Crime Control Act, the new Act which sets up the standard of immunity different from the prior standard. They divide on the question of whether the standard in the Control Act requires immunity from prosecution or immunity from the transaction, it is sometimes termed, or from use of the testimony and evidence obtained by its use directly or indirectly.

The District Court of the Southern District of New York has very clearly stated that it concludes that the new statute should be interpreted as a use statute and it violates the Fifth Amendment as such, since it does not preclude prosecution. That is the Kinoy case, which you are both familiar with, which Judge Motley decided and the opinion I am sure all counsel has read. It was furnished to me and which I read carefully.

That decision, of course, is supported, depending upon how you interpret the Counselman case. But it is relied on heavily and the position of the witnesses in this case is supported at least in their contention by the Counselman case.

I am not going to go into the Counselman case. That is the case in 142 United States Supreme Court. It is the old case which they all go back to. There have [42] been other decisions since then, of course, Albertson, and there are several other cases that go back to the Counselman case and recite that provision in the Counselman case, which, in effect, says there must be absolute immunity.

We know that in the Counselman case the statute involved did not include immunity from the use of the testimony directly or indirectly.

Now, the other side, that is, the ones that support the use immunity position, rely on the Murphy case, and that, Mr. Manes points out, is a dual jurisdiction case. And also on Gardner v. Broderick, at 392 U.S. 273, 276 in particular.

Now, the question of the dual jurisdiction, that matter was discussed in the New Jersey Supreme Court case, Zicarelli v. New Jersey State Commission of Investigation, in 261 Atlantic 2d 129. That case involved the similar situation that we have here, the interpretation of the statute which is a use statute as such, that does preclude, in addition to the testimony, the use of the testimony in any criminal prosecution, it precludes the use of any evidence obtained by the direct or indirect use of such testimony. That is a 1970 decision of the Supreme Court of New Jersey.

On this point of duality, the court at page 140 says: [43]

> "There is a difference in that Murphy dealt with a federal-state setting whereas we are here dealing with the claim that our statute does not protect a witness from prosecution under our state law. But the question in both is the same, that is, what immunity the Fifth Amendment requires in exchange for complusion to answer. The values involved are the same. We see no sensible basis for a different answer. Gardner v. Broderick treat-

ed the issue as one and the same, citing both Counselman and Murphy. Murphy held and Gardner repeated that the Fifth Amendment requires protection only from the use of the compelled testimony and the leads it furnishes, and that protection our statute expressly provides."

Then they cite McClosky.

Now, Justice White also in the Murphy case in his concurring opinion, I conclude from reading that concurring opinion that he also indicates that the dual jurisdiction doesn't create an issue.

Now, as to the point that the new standard does not protect against the possiblility of prosecution, based in part on the compelled testimony, that is discussed [44] by Justice White in the concurring opinion in the Murphy case, 378 U.S., at pages 101 and 102. He discusses Counselman at length, and at 101 he says:

"It is argued that a rule only forbidding use of compelled testimony does not afford absolute protection against the possibility of a federal prosecution based in part on the compelled testimony. It is said that absent any deliberate attempt by federal officers to utilize the testimony the very identification of testimony of the witness in the state proceedings, perhaps in the newspapers, may increase the possiblility of a federal prosecution and alternatively that the defendant may not be able to prove that evidence was intentionally and unlawfully derived from his compelled testimony. These are fanciful considerations, hardly sufficient as a basis for a constitutional adjudication work-

ing a substantial reallocation of power between state and national governments."

Then he goes on and discusses the point further, saying:

"The danger that a defendant may not [45] be able to establish that other evidence was obtained through the unlawful use by federal officials of inadmissible compelled testimony is insubstantial. The privilege protects against real dangers, not remote and speculative possibility."

And he cites Brown v. Walker and Heike v. United States and Mason v. United States. And going on:

"First, one might just as well argue that the Constitution requires absolute immunity from prosecution wherever the Government has obtained an inadmissible confession or other evidence through an illegal search and seizure, an illegal wiretap, illegal detention, and coercion. A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege."

And then it goes on with Malloy v. Hogan, and so forth, Bram v. United States.

Now, as to the statement of the Supreme Court which is the portion of the Counselman case that gives such impetus to the argument of the witnesses in this case, and in other cases where similar statutes are involved, and [46] that quotation—and I quote from Counselman—"A statutory enactment to be valid must afford absolute immunity against a future prosecution for the offense to which the question related."

That is the portion of the Counselman case that gives support to the position of the witnesses here, although, as I say, I am not goint into the Counselman case and go through it insofar as the statute involved there. There is also the statement, of course, in the Counselman case that they didn't even provide in the statute that evidence obtained by the use of the testimony directly or indirectly would be precluded as a part of the immunity.

As to this point, Justice White at page 105 of his concurring opinion in Murphy said,—he is discussing Counselman and the statement from Counselman—

> "It then invalidated the first immunity statute to come before it because 'the statute could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding. . . . It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which [47] he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.' "

He cites 142 U.S. 547, at 564 of Counselman. And going on:

> "In a dictum indicating that some immunity statutes are valid, the court added that 'a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.' At page 586. Whatever may be the validity of this dictum where the witness is being investigated by a grand jury for

the purpose of indictment for a particular offense and where the grand jury proceedings are conducted by the same government attempting to obtain a conviction for the offense—the facts of Counselman—it clearly has no validity, and by its own terms, no applicability, where the inquiry does not concern any federal offense, no less a particular one, and the government seeking the testimony has no purpose or authority to prosecute for federal crimes. [48]

"The Constitution does not require that immunity go so far as to protect against all prosecutions to which the testimony relates, including prosecutions of another government, whether or not there is any causal connection between the disclosure and the prosecution or evidence offered at trial. In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation." [49]

So we have diverse views on this matter. My views are well set forth, I would say, by the Supreme Court of New Jersey in this Zicarelli case, beginning at page 137, over to and including 140.

In the Gardner v. Broderick case, 392 U.S. 273, at 276, the court said: —and they discussed the Murphy case and the Counselman case and the Albertson case and all these other cases that are constantly cited, and properly so. The court said:

"The privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made. Answers may be compelled regardless of the privilege if there is immunity from federal

and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."

So I conclude that the witnesses are required to answer the questions under the standard of immunity as prescribed in the Act.

Now, we know that Congress in passing this new Act was well aware of Counselman v. Hitchcock and the Murphy case. The legislative history so indicates. So this is a matter that is something that will probably have to be decided by the Supreme Court. [50]

In the Piccirillo case the court didn't take it, and you know why, and I won't go into that. There is no question but that I would gather from the Piccirillo case, if I am pronouncing it right, but you know the case I am talking about, but what the Supreme Court will do when it finally reaches this issue presented by counsel in this case, of course, anyone can predict. I do think from that case, from the defense, that there are two, possibly three of the judges that have indicated they are not in accord with the immunity under the present statute. In other words, I would conclude that they may well support the transaction immunity as distinguished from the use immunity.

Be that as it may, there is good authority on both sides. It all goes back to Counselman, and whether that is dictum and what the court will finally do—the legislature has, having in mind Counselman and Murphy, that this should be the standard. So until the standard I will follow.

I wouldn't follow it if, in good conscience, I didn't feel it was constitutional. I do feel it is in the circumstances and therefore I will follow it.

There is one thing, however, that I would ask, and I would ask the Government to indicate the subject of the inquiry. I suppose your position is that the new statute doesn't require that. [51]

MR. NISSEN: Your Honor, no statute requires it and we decline to do so. It is a Grand Jury Investigation.

THE COURT: Yes, but the old statute did.

MR. NISSEN: Which one, sir?

THE COURT: The Grand Jury investigation—

MR. NISSEN: The old statute specified certain types of investigation under which that statute could be used.

THE COURT: Even under Bart,, as I recall it,—I don't have Bart here, but Bart said that your affidavit wasn't sufficient. That wasn't because of the subject matter.

MR. NISSEN: In re Bart, your Honor, had nothing to do with either statute we are talking about, your Honor.

THE COURT: I understand it didn't have to do with the statute we are talking about. But I am saying my understanding is that prior to this present statute you were required to disclose the subject matter of the investigation.

MR. NISSEN: Absolutely not. Absolutely not.

THE COURT: What about it, Mr. Manes, is that your understanding? [52]

MR. MANES: It is my understanding and moreover, your Honor, in our memorandum we also pointed out a second point which your Honor has not indicated a ruling on in which that issue comes up, namely, that the affidavit was inadequate in support of the order.

THE COURT: The only indication of the inadequacy of the affidavit, in my judgment, is the issue of

the subject matter. Mr. Nissen is very firm in his position that they don't have to indicate what the subject matter of the investigation is.

My conclusion is that they did. What is the citation of the Bart case? I had it here.

MR. HOLMES: 304 F. 2d 631.

MR. NISSEN: Your Honor, I might call your attention to the statute in this case, Sections 6002 and 6003, which sets out what is required.

THE COURT: I have read that, Mr. Nissen, and I know that is your position. It doesn't say you have to divulge the subject matter. But prior to this statute my understanding is that you did.

MR. NISSEN: That is not true and it never has been true.

THE COURT: Let's see what Bart says.

MR. NISSEN: We have previously listed the statutory violation which the jury was investigating, Title [53] 18 this or that.

THE COURT: Yes.

MR. NISSEN: But we have never said what the subject matter was.

THE COURT: You haven't given that information here, have you?

MR. NISSEN: No, because the statute applies to any grand jury investigation. The 2514 statute applies to the enumerated ones, your Honor.

THE COURT: Are you saying it is only under the investigation by the Grand Jury concerning threatened national security that you have to get one of the listed offenses?

MR. NISSEN: The Bart case related to a specific statute dealing with national security, and the court there dealt with that special statute.

In that situation a different standard and different elements were required. It had to be shown to the court that it affected national security.

THE COURT: Do you have any authorities, Mr. Manes, for your position that the affidavit is insufficient because it doesn't state the subject matter?

MR. MANES: Your Honor, just the authorities we submitted in our memorandum of points and authorities.

THE COURT: What authority? [54]

MR. MANES: Well, of course, our theory was that since the—for the proposition that since the witness was giving up or being compelled to surrender a constitutional right that the reasonable cause provision of the Fourth Amendment that merged into the Fifth, under the theory of Boyd v. United States, your Honor, and that under the cases like Sniadach v. Family Finance, Marcus v. Search Warrants, and even under Joint Anti-Fascist Refugee Committee v. McGrath, that line of cases, your Honor, where, even though the Attorney General may have certain powers which abridge or which limit the First Amendment, I believe, or constitutional right, that they must afford due process.

Our contention here is that the surrender of immunity, without even a hearing—without some kind of support, without a showing by the Attorney General of reasonable cause thus abridges the Fourth and the Fifth together.

THE COURT: I understand now.

MR. MANES: Yes, sir.

THE COURT: Mr. Nissen, what did you have to include in your affidavit prior to the statute in an immunity situation like we have here, prior to this statute?

MR. NISSEN: Instead of the three elements, which are listed in the present application, let me recite [55] for the record—

THE COURT: No Well, I—

MR. NISSEN: I am going to add one to it.

THE COURT: I want to be more specific. What did you have to say with respect to what the investigation concerned?

MR. NISSEN: The standard statement which has, by the way, been approved by the Court of Appeals in Licata, and which was vacated as moot, but not in any way disapproved, was this, your Honor:

No. 1, that the application was made with the approval of the Attorney General, which is also required here.

No. 2, that the judgment of the U.S. Attorney was that it was necessary to the public interest, which is also included here.

THE COURT: Yes.

MR. NISSEN: Thirdly, that the witness had declined to answer under his constitutional right to decline to incriminate himself. That is modified here to be either that he had declined or he is likely to decline. Nonetheless, it is very much the same.

And a fourth element was included as follows: That the proceeding involved an inquiry into possible violation of any violation enumerated in Section 2516 of Title [56] 18, which is the statute dealing with wiretaps, incorporated by reference in 2514. In other words, it was one of the enumerated statutes.

In Licata it said, for example, as that fourth item, "The Grand Jury is presently inquiring into possible violations of Title 18 United States Code, Section 1952.

and other violations of the law." And that is all it said. There was no subject matter, no nothing. It just said that it came within the statute.

This present statute is open for immunity in any and every case and there is no need to say which statutes are the subject matter of the investigation.

I would also point out Mr. Manes is arguing for a probable cause showing to your Honor, to say why we should call the witness, we have to prove that he is going to be worth something. The Grand Jury has no—

MR. MANES: That is not true.

THE COURT: All right. I don't want any more argument on it because I have read all your points and authorities, and so forth.

MR. MANES: I just didn't want your Honor to understand that was my position, as stated by counsel. It was only that a reasonable cause should be shown for grant of immunity, not for calling the witness to testify.

THE COURT: Well, I conclude that the witnesses [57] are required to answer the questions.

Now, have the questions been propounded and have they refused to answer them?

MR. NISSEN: Yes, sir, as I informed you at the previous proceeding. Each one has appeared in the Grand Jury and has declined to answer questions. We are asking the court order them to return and answer the questions.

We have not, of course, gone on to every question we would ask. There is no point in wasting that time.

MR. HOLMES: Your Honor, I would like to clarify one point. Mr. Stewart has declined to answer one question. He hasn't been propounded any other question.

THE COURT: All right. The witnesses Charles J. Kastigar and Michael G. Stewart are ordered to answer the questions on being granted the immunity provided by the statute here involved.

MR. MANES: Your Honor, may I respectfully ask your Honor a question, please?

THE COURT: Yes.

MR. MANES: This has to do with procedure. I am not going to argue.

If the court please, I am advised that if, as and when Mr. Kastigar is brought back before the Grand [58] Jury that he will respectfully decline to answer, thus raising the issue that your Honor has discussed this morning.

I am at this time engaged in a trial, and so that is the reason why I am posing this question to your Honor: May your Honor—would it be psosible for your Honor to consider the granting of bail when that event arises? In view of the substantial question which is raised by this problem, if your Honor please, I think your Honor's opinion indicates there is a substantial issue in the question, and we would respectfully ask that Mr. Kastigar be allowed to bail, reasonable bail or to go on personal surety.

He has been present and attended all sessions required of him pursuant to subpoena, your Honor. He is a resident of this District and has been for some years. He is employed by the Government or employed in a defense industry, and I would respectfully ask your Honor—

THE COURT: What is the Government's position?

MR. NISSEN: Your Honor, the Grand Jury cannot

operate if persons who will not obey court order are admitted to bail.

I might say again that he hasn't refused yet.

THE COURT: I know he hasn't, but he is indicating he is not going to, so I can understand his [59] position.

MR. NISSEN: Yes, your Honor.

THE COURT: If he refuses to answer the questions and I conclude that he is in contempt I will order his confinement.

When will the Grand Jury come back the next time?

MR. NISSEN: The Grand Jury will be meeting regularly possibly once a week.

THE COURT: Then I would stay the order for three days to allow them to go to the Court of Appeals to see if they can get a stay up there.

MR. MANES: I would hope that that would be about five days—

MR. NISSEN: We would object to that.

Your Honor, in the first place, I think your Honor should advise the witnesses, both of them, they are not defendants here, they are strictly witnesses.

THE COURT: They are not defendants, they are strictly witnesses. It is a civil matter.

MR. NISSEN: Has your Honor signed the order, by the way, that they would receive copies of or you will do so this morning?

THE COURT: No, I haven't. Where are the orders? [60]

MR. NISSEN: They were—

THE COURT: Here they are. They were given to me.

I can't make any promises, Mr. Manes, as to—I won't grant them bond, I won't grant them bail. Obviously, the Grand Jury couldn't operate.

I might grant them a stay, Mr. Nissen.

MR. NISSEN: Could I first ask your Honor to advise both witnesses that if they decline to obey your order that they may be held in civil contempt and confined until they do?

THE COURT: Yes. You are so instructed, both Mr. Kastigar and Mr. Stewart, if you refuse to answer the questions you may well be found to be in contempt. If you are found to be in contempt you will be ordered confined to jail until you answer the questions or until the Grand Jury term expires.

MR. NISSEN: Might I say this, also, your Honor: We will argue, of course, if they ask for a stay, and at the appropriate time this occurs we will argue against it. I would like to point out—

THE COURT: I am not saying I am going to give the stay.

MR. NISSEN: The present statute indicates that the Court of Appeals must decide the question within [61] thirty days. The Court of Appeals could decide, No. 1, whether to admit them to bail. No. 2, they would have to decide it within thirty days.

THE COURT: Whether they are going to be admitted to bail, that is why I would grant the stay, if I do, to allow them to go to the Court of Appeals. I will not grant the bail.

They may send them back to me to fix bail, you know that.

MR. NISSEN: I don't know it, but—

THE COURT: You know it has happened.

MR. NISSEN: It has happened once and I hope it never happens again.

THE COURT: Well, I know, but it has happened.

MR. NISSEN: Will you instruct the two witnesses to report to the Grand Jury room on the 13th floor, your Honor?

THE COURT: Yes. On the 13th floor, is it?

MR. NISSEN: Yes.

THE COURT: They have been up there?

MR. NISSEN: Yes.

THE COURT: Mr. Stewart and Mr. Kastigar, are you here?

MR. KASTIGAR: Yes.

MR. STEWART: YES. [62]

THE COURT: Do you both know where the Grand Jury room is on the 13th floor?

MR. KASTIGAR: Yes.

MR. STEWART: Yes.

THE COURT: You are ordered to appear up there now.

Here are the orders.

(Whereupon, at 9:30 o'clock a.m., Thursday, February 11, 1971, an adjournment was taken.) [63]

LOS ANGELES, CALIFORNIA, THURSDAY, FEBRUARY 11, 1971, 11:05 A.M.

MR. NISSEN: Your Honor, David Nissen representing the United States.

MR. HOLMES: Oliver Holmes for Michael Stewart, your Honor, and I am appearing in behalf of Hugh Manes for Mr. Kastigar at this proceeding.

MR. NISSEN: Your Honor, both witnesses have returned to the Grand Jury room and refused to answer

questions put to them on the grounds of the Fifth Amendment, despite your Honor's order.

I would like to call the Grand Jury reporter briefly to read for your Honor the brief segment of questions and refusals, so it won't be just my word it happened but it will be a sworn testimony.

THE COURT: Very well.

MR. NISSEN: Rick Franks, please.

RICK FRANKS,

called as a witness, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated.

Will you state your name and spell it, please.

THE WITNESS: My name is Rick Franks, F-r-a-n-k-s. [64]

DIRECT EXAMINATION

BY MR. NISSEN:

Q Are you a shorthand reporter, Mr. Franks?

A Yes, I am.

Q Authorized to report proceedings before the Federal Grand Jury?

A Yes, I am.

Q Have you on this day been present in the Grand Jury room when two witnesses, one named Charles Kastigar and the other named Michael Stewart, appeared in the room?

A Yes.

Q Let's take Mr. Kastigar's testimony, please, and have you recorded on your stenotype tape questions asked of him and his answers?

A Yes.

Q Have you done the same with Mr. Stewart?

A Yes.

Q Are you able to read from those correctly what occurred in there?

A Yes.

Q Would you read, please, first Mr. Kastigar's part where he is questioned and the answers he gave.

A This is question by Mr. Nissen:

"Mr. Kastigar, as we told you before, [65] the Grand Jury has received a great deal of information concerning a situation in which you had orthodontic braces placed on your teeth just prior to reporting for military induction and had them removed just after a word by a Dr. Bernard Bender, with offices at 8328 De Soto in Canoga Park.

"Would you tell us, please, how that came about?

"A I'm sorry, I decline to say anything about that on the basis that my answer may tend to incriminate me and on the advice of counsel."

That was one question that was phrased like that. And then the next question by Mr. Nissen is:

"Do you intend to take that same position with respect to all questions concerning this subject matter, so we don't waste your time or our time?

"A I intend to take the Fifth Amendment.

"Q Even though the court has instructed you to answer?

"A That is correct."

Q All right. Now take Mr. Stewart and read [66] us the questions asked of him and his answers.

A This is a question by Mr. Nissen and Mr. Stewart is answering:

"Q Would you please tell us how it came about that you went to Dr. Bender for the so-called dental services which I described?

"A Okay. On that I will have to respectfully decline to answer on the ground it may incriminate me.

"Q You have been told here in court by the judge that you are under the immunity statute and nothing you say can be used against you?

"A I understand.

"Q Are you refusing to answer on any other grounds or for any other reason, other than self-incrimination?

"A I will use self-incrimination."

And that is it.

MR. NISSEN: Your Honor, we ask the court to instruct Mr. Kastigar to answer the questions propounded to him and Mr. Stewart the ones propounded to him, and to hold them in civil contempt if they persist in their refusal.

THE COURT: Mr. Stewart, you are ordered to [67] answer the questions propounded to you and as you have heard read.

Do you refuse to?

MR. STEWART: Yes, I do, sir.

THE COURT: On the ground it might incriminate you?

MR. STEWART: Yes.

THE COURT: You heard the court's ruling this morning, that if you did refuse you would be guilty of contempt of the court and ordered to be imprisoned, you understood that?

MR. STEWART: Yes.

THE COURT: The court finds that you are in contempt of court, by reason of your refusal to answer the questions, and you are committed to the custody of the Attorney General of the United States until the questions are answered or during the term—

MR. NISSEN: The life of the Grand Jury?

THE COURT: —the life of the Grand Jury.

MR. HOLMES: Your Honor, with respect to Mr. Stewart's confinement, I request that be stayed to give us an opportunity to apply for a stay and/or bail.

THE COURT: When does this Grand Jury meet again?

MR. NISSEN: Your Honor, it meets Thursday [68] next week. Could we be heard on the matter of stay after you have also dealt with Mr. Kastigar?

THE COURT: Yes.

Mr. Kastigar, you are ordered to answer the questions as submitted and as read by the reporter.

Do you refuse to answer them?

MR. KASTIGAR: I take the Fifth Amendment, your Honor.

THE COURT: You refuse to answer them on the ground it might incriminate you?

MR. KASTIGAR: Yes, sir.

MR. NISSEN: Would your Honor make it plain that you are now ordering him to answer and asking him if he now refuses.

THE COURT: I am now ordering you to answer those questions. Do you now refuse to answer them?

MR KASTIGAR: Your Honor, I respectfully decline to answer them as my answers may tend to incriminate me and on the advice of counsel.

THE COURT: Very well. You have heard my ruling this morning and my instructions to you that if you refuse to answer them you would be in contempt of court and subject to imprisonment.

MR. KASTIGAR: I heard your ruling.

THE COURT: The court finds that the witness [69] Kastigar is in contempt of court and commits him to

the custody of the Attorney General of the United States until the questions are answered or during the life of the Grand Jury.

Now, what about the stay?

MR. HOLMES: Your Honor, I—

THE COURT: I understood your request. Now I want to hear from the Government.

MR. NISSEN: Your Honor, in the first place, the Grand Jury proceeding is thwarted when delays occur and witnesses will not fulfill their obligations.

Now, in the past, in the Licata case, for example, stays, continuances, bail were requested, requested and requested, and refused all the way to the Supreme Court.

Your Honor mentioned a case this morning and I think you are referring to the same case I was thinking of, in which the Ninth Circuit granted bail and then decided the case within thirty days, as the law requires it to.

We are asking the court here, not only not to grant bail, as you say you won't, but to refuse a stay and let these witnesses approach the Court of Appeals, which has all the authority in the world to issue a stay if one is meritorious. That way we can at least get before the court to see whether a stay is appropriate.

THE COURT: I understand your position, Mr. [70] Nissen. If this question were well determined and I didn't think there was a substantial issue here I wouldn't grant the stay.

In the circumstances I do and I am going to grant the stay for three days.

MR. HOLMES: Your Honor, may I just indicate we are facing a four-day holiday.

THE COURT: Well, I am going to grant the stay for three days. I will grant the stay until noon—we

have a holiday there. I will grant the stay until noon, February 16th; at 12:00 o'clock noon, Februrary 16th.

Mr. Kastigar and Mr. Stewart,—

MR. STEWART: Yes.

MR. KASTIGAR: Yes.

THE COURT: —your imprisonment is stayed until 12:00 o'clock noon, February 16th, that is Tuesday, February 16th, and you are ordered to report to the United States Marshal on the Main Street floor of this building not later than 12:00 o'clock noon on February 16th, without fail.

If you do not, of course, a bench warrant will be issued for your arrest. So be sure you report to the Marshal not later than 12:00 o'clock noon.

All right.

MR. HOLMES: Thank you, your Honor. [71]

(Whereupon, at 11:15 o'clock a.m., Thursday, Febuary 11, 1971, an adjournment was taken.) [72]

In the United States District Court, Central District of California.

In the Matter of: Michael Gorean Stewart and Charles Joseph Kastigar. No. 2649—Misc. and No. 2650—Misc.

CERTIFICATE

I, Virginia K. Wright, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 72 pages are a true and correct transcript of the proceedings had in

the above-entitled matter on February 4 and February 11, 1971, and that said transcript is a true and correct transcript of my stenographic notes.

Dated at Los Angeles, California, this 26th day of February 1971.

/s/ Virginia K. Wright
Virginia K. Wright
Official Reporter [73]

Application for Immunity. 18 U.S.C. §§ 6002, 6003.

United States District Court, Central District of California.

In the Matter of Michael Gorean Stewart. 2649-Misc.

Filed: Feb. 4, 1971.

The United States of America hereby moves the Court for an order instructing Michael Gorean Stewart to testify and produce evidence pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6003, and respectfully represents as follows:

1. A duly constituted grand jury is presently inquiring into alleged violations of laws of the United States.

2. Michael Gorean Stewart has been subpoened to appear before the Grand Jury on February 4, 1971 and is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

3. This application is made in good faith, with the approval of the Attorney General of the United States, by the United States Attorney, in whose judgment the testimony of Michael Gorean Stewart is necessary to the public interest.

WHEREFORE, the United States of America requests the Court to ORDER Michael Gorean Stewart to answer questions and produce evidence relating to all matters pertinent to the pending grand [1] jury

inquiry, pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6003.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

/s/ David R. Nissen
DAVID R. NISSEN
Assistant U. S. Attorney
Chief, Criminal Division [2]

Affidavit.

State of California, County of Los Angeles—ss.

ROBERT L. MEYER, being first duly sworn, deposes and says:

1. I am United States Attorney for the General District of California;

2. This application is made in good faith with the approval of the Attorney General of the United States;

3. In my judgment the testimony of Michael Gorean Stewart sought is necessary to the public interest and material to the investigation now being conducted by the grand jury;

4. The grand jury is presently inquiring into alleged violations of laws of the United States.

5. Michael Gorean Stewart has been subpoened to appear before the grand jury on February 4, 1971 and is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Robert L. Meyer

Subscribed and Sworn to before me this 4th day of February, 1971.

Kathryn A. Clark

Notary Public in and for said County and State

My Commission expires:

[Seal].

Official Seal Kathryn A. Clark, Notary Public. California Principal Office in Los Angeles County. My Commission Expires December 29, 1972.

Order.

United States District Court, Central District of California.

In the Matter of Michael Gorean Stewart. 2649-Misc.

Filed: Feb. 11, 1971.

The United States of America, having made written and oral application for an order compelling Michael Gorean Stewart to testify and produce evidence before a duly constituted grand jury of the Central District of California, pursuant to Title 18, United States Code, Sections 6002 and 6003, and

Michael Gorean Stewart, being likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination, the grand jury being engaged in an inquiry into alleged violations of laws of the United States; and

The application for immunity having been approved by the Attorney General of the United States and made by the United States Attorney in whose judgment the testimony sought is necessary to the public interest, it is

ORDERED that Michael Gorean Stewart appear forthwith before the grand jury and testify and produce evidence with respect to all matters under inquiry by the grand jury.

DATED: Feb. 11, 1971.

E. AVERY CRARY
UNITED STATES DISTRICT JUDGE

Application for Immunity. 18 U.S.C. §§ 6002, 6003.

United States District Court, Central District of California.

In the Matter of Charles Joseph Kastigar. 2650-Misc.

Filed: Feb. 4, 1971.

The United States of America hereby moves the Court for an order instructing Charles Joseph Kastigar to testify and produce evidence pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6003, and respectfully represents as follows:

1. A duly constituted grand jury is presently inquiring into alleged violations of laws of the United States.

2. Charles Joseph Kastigar was subpoenaed to appear and did appear before the grand jury on September 9, 1970, at which time he refused to answer questions on the ground that his answers might tend to incriminate him.

3. This application is made in good faith, with the approval of the Attorney General of the United States, by the United States Attorney, in whose judgment the testimony of Charles Joseph Kastigar is necessary to the public interest.

WHEREFORE, the United States of America requests the Court to order Charles Joseph Kastigar to answer questions and produce evidence relating to all matters pertinent to the pending grand [1] jury inquiry, pur-

suant to the provisions of Title 18, United States Code, Section 6002 and 6003.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

/s/ David R. Nissen
DAVID R. NISSEN
Assistant U. S. Attorney
Chief, Criminal Division [2]

Affidavit.

State of California, County of Los Angeles—ss.

ROBERT L. MEYER, being first duly sworn, deposes and says:

1. I am United States Attorney for the Central District of California;

2. This application is made in good faith with the approval of the Attorney General of the United States;

3. In my judgment the testimony of Charles Joseph Kastigar sought is necessary to the public interest and material to the investigation now being conducted by the grand jury;

4. The grand jury is presently inquiring into alleged violations of laws of the United States;

5. On September 9, 1970, Charles Joseph Kastigar appeared before the grand jury and invoked the constitutional privilege against self-incrimination and refused to answer.

Robert L. Meyer

Subscribed and sworn to before me this 4th day of February, 1971.

Kathryn A. Clark

Notary Public in and for said County and State

My Commission expires:

[Seal].

Official Seal, Kathryn A. Clark, Notary Public. California Principal Office in Los Angeles County. My Commission Expires December 29, 1972.

Order.

United States District Court, Central District of California.

In the Matter of Charles Joseph Kastigar. 2650-Misc.

Filed: Feb. 11, 1971.

The United States of America, having made written and oral application for an order compelling Charles Joseph Kastigar to testify and produce evidence before a duly constituted grand jury of the Central District of California, pursuant to Title 18, United States Code, Sections 6002 and 6003, and

Charles Joseph Kastigar, on September 9, 1970, having declined to answer questions before the grand jury by claiming his privilege against self-incrimination, the grand jury being then engaged in an inquiry into alleged violations of laws of the United States; and

The application for immunity having been approved by the Attorney General of the United States and made by the United States Attorney in whose judgment the testimony sought is necessary to the public interest, it is

ORDERED that Charles Joseph Kastigar appear forthwith before the grand jury and testify and produce evidence with respect to all matters under inquiry by the grand jury.

DATED: Feb. 11, 1971.

E. AVERY CRARY
UNITED STATES DISTRICT JUDGE

Criminal Minutes—General.

United States District Court, Central District of California.

Case No. 2650-Misc. Crim.

Date February 11, 1971.

DOCKET ENTRY:

In the Matter of Grand Jury Testimony of Charles Joseph Kastigar. Ct & cnsl confer. Govt states wit has refused to testify before G./J. Ct reporter C.S.T. as to Q. propounded to wit. Ct ords wit to ans Q. Wit refuses to ans. Ct finds wit in contempt of Ct & ord wit committed to Custody of A/G unitl Q.'s are ans or until G/J discharged. Cnsl moves Ct for stay of exec. Cnsl argue mot for stay. Ct grants stay of exec to 12 noon on Feb 16, 1971. Wit to surr to U.S. Marshal on that date or B/W issue for his arrest. (EAC)

PRESENT: HON. E. Avery Crary, JUDGE, Wayne E. Payne, Deputy Clerk; Virginia Wright, Court Reporter; David Nissen, Asst. U.S. Attorney.

U.S.A. v. Witness Charles Joseph Kastigar, present.

Attorneys for Witness Oliver Wendell Holmes, Jr. appearing for Hugh Manes, present.

PROCEEDINGS:

Attorney Oliver W. Holmes appears for attorney Hugh Manes on behalf of witness Kastigar. Counsel for government states said witness has refused to answer questions before the grand jury.

Richard Franks, Court Reporter is called, sworn and reads questions and answers propounded to the witness. Court orders witness to answer the questions. Witness refuses to answer questions.

Court finds witness in contempt of Court and orders witness committed to the custody of the Attorney General until the questions are answered or until the Grand Jury is discharged.

Counsel for witness moves for stay of execution. Government states opposition and objections to stay of execution. Counsel argue.

Court grants stay of execution until 12 noon on February 16, 1971. Witness is ordered to surrender to the U.S. Marshal on said date and hour or a Bench Warrant for his arrest will issue. [7]

CIVIL DOCKET

United States District Court. 2649.

In the Matter of Michael Gorean Stewart. Application for Immunity.

2/12/71, 16501 (rcpt); $5.00, 2/17/71. [20]

2/4/71 Fld Application for Immunity & an ord requiring Stewart to testify bef the grand jury. LODGED Ord (Unsigned) that Michael Gorean Stewart appear forthwith bef the grand jury.

2/9/71 Fld Respondent's Memo of Pts & Authors in Support of Objection to Issu of Ord Granting Immunity Under 18/6002, 6003.

2/4/71 In the matter of G/J testy of Michael Gorean Stewart:
Ct & cnsl confer, Govt mks applic for immunity of wits. Cnsl for wits states objects to applictn. Ct takes matter und submission & cont hrg to 2/11/71, 9 am. (EAC)

2/11/71 Hrg: Mot by U.S. for issuance of ord grantg immunity & compling wit to testify bef the G/J. Ct addresses cnsl re mot takn und submissn on 2/4/71. Ct rules on mot & ords wit to ans Q's propounded by G/J. Ct ords wits to proceed to G/J room forthwith, Fld ord compelling wit to testify & produce evid in regards to matter under inquiry G/J. (EAC)

2/11/71 Ct & cnsl confer. Govt states wit has refused to testify bef G/J. Ct reportr C.S.T. as to Q's propounded to wit. Ct ords wit to ans Q's-wits refuses to answer. Ct finds wits

in contempt of Ct & ord wit committd to custy of A/G until questions are ans. or until life of the G/J has expired. Cnsl moves Ct for stay of exec. Cnsl argue mot for stya. Ct. grants stay of exec to 12 noon, 2/16/71. Wit to surrender on or bef that date or B/W to be issd for his arrest. (EAC)

2/12/71 Fld Notc of Appeal as to wits Michael Gorean Stewart & issd cys to (EAC), US Atty, US Mars, P/O, wit & wits' cnsl, Oliver W. Holmes. Flg fee paid, cnsl retd.

2/16/71 Fld Ord (EAC) Staying Exec of Sent of Contempt until 12:noon 2/16/71.
Fld Affidavit of Elizabeth Spector.

2/22/71 Fld in Cases 2649-Misc & 2650-Misc. (Consolidated for Appeal) Designation of both defts Michael Gorean Stewart & Charles Joseph Kastigar's Designation of Record on Appeal purs to Rules 10(b) and 11 FRCP. I hereby attest and certify on February 26, 1971 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA
By /s/ ILLEGIBLE, Deputy [21]

CIVIL DOCKET

United States District Court. 2650.

In the Matter of Charles Joseph Kastigar. Application for Immunity.

2/12/71, 16502. §5.00 (.....) 2/17/71. [20]

2/4/71 Fld Application for Immunity & on ord for Charles Joseph Kastigar to testify bef the grand jury.

2/9/71 Fld Respondent's Memo of Pts & Authors in Support of Objection to Issu of Ord Granting Immunity under 18/6002, 6003.

2/4/71 Ct & cnsl confer. Govt mks applic for immunity of wits. Cnsl for wit states objects to applic. Ct. takes matter und submissn & cont hrg to 2/11/71, 9am. (EAC)

2/11/71 Hrg: Mot by U.S. for issuance of ord grantg immunity & compling wit to testify bef the G/J. Ct. addresses cnsl re mot tkn und submissn on 2/4/71. Ct rules on mot & ords wit to proceed to G/J room forthwith. Fld ord compelling wit to testify & produce evid in regards to matter und inquiry by G/J. (EAC)

2/11/71 Ct & cnsl confer; Govt states wit has refused to testify bef G/J. Ct reportr C.S.T. as to Q's propounded to wit. Ct ords wit to ans questions. Wit refuses to ans. Ct finds wit in contempt of Court & ord wit committed to custy of A/G until questions are ans or until G/J dischargd. Cnsl moves for stay of exec. Cnsl argue mot for stay. Ct grants

stay of exec to 12 noon, 2/16/71, wit to surr to U.S. Mars on that date or B/W issue for his arrest (EAC)

2/12/71 Fld Notc of Appeal as to Charles Joseph Kastigar & issd cys to (EAC), U.S. Atty. wit. wits cnsl Hugh R. Manes, U.S. Mars. Flg fee paid.

2/16/71 Fld Ord Staying Execution of Sent of Contempt to 12:00 noon 2/16/71 (EAC)
Fld Affidavit of Elizabeth Spector.

2/22/71 Fld in Cases 2649-Misc. & 2650-Misc. (Consolidated for Appeal) Designation of Record on Appeal on behalf of Michael Gorean Stewart and Charles Joseph Kastigar purs to Rules 10(b) and 11 FRCP.
I hearby attest and certify on Feb. 26, 1971 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA
By E. Ralph Derric, Deputy [21]

CIVIL DOCKET

United States District Court, 2650.

In the Matter of Charles Joseph Kastigar. Application for Immunity.

2/12/71, 16502, $500, (cpt) 2/14/71. [20]

Notice of Appeal.

United States District Cour, Central District of California.

In the Matter of Charles Joseph Kastigar. No. Misc. 2650-EAC.

Filed: Feb. 12, 10:59 AM '71.

NOTICE IS HEREBY GIVEN that CHARLES JOSEPH KASTIGAR hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order adjudging him to be in contempt of court entered in this action on the 11th day of February, 1971.

HUGH R. MANES
/s/ Hugh R. Manes

HUGH R. MANES
Attorney for Charles Joseph Kastigar
[16]

Notice of Appeal.

United States District Court, Central District of California.

In the Matter of Michael Gorean Stewart. No. Misc. 2649—EAC.

Filed: Feb. 12, 10:59 AM '71.

NOTICE IS HEREBY GIVEN that MICHAEL GOREAN STEWART hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order adjudging him to be in contempt of court entered in this action on the 11th day of February, 1971.

MARGOLIS, McTERNAN, SMITH, SCOPE & HERRING

By /s/ Oliver W. Holmes
OLIVER W. HOLMES
Attorney for Michael Gorean Stewart
[16]

United States Court of Appeals, for the Ninth Circuit.

Michael Gorean Stewart, Applicant, v. United States of America, Appellee. No. 71-1212.

Charles Joseph Kastigar, Appellant, v. United States of America, Appellee. No. 71-1213.

Filed: Mar. 10, 1971.

William B. Luck, Clerk

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH, HUFSTEDLER and TRASK, Circuit Judges.

PER CURIAM:

Pursuant to Section 301(b) of the Organized Crime Control Act of 1970 (28 U.S.C. § 1826(b)), and particularly the time limitation therein, it is the decision of this court that the orders of the United States District Court, entered in each of the above cases on February 11, 1971, entered in each of the above cases on February 11, 1971, adjudging the respective appellants in civil contempt and ordering them confined, are AFFIRMED.

An opinion of this panel will be filed in due course. [87]

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Michael Gorean Stewart, *Appellant,* v. United States of America, *Appellee.* No. 71-1212.

Charles Joseph Kastigar, *Appellant,* v. United States of America, *Appellee.* No. 71-1213.

[March 29, 1971].

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH, HUFSTEDLER and TRASK, Circuit Judges.

PER CURIAM:

This is an appeal from an order of the district court adjudging the appellants, Michael Stewart and Charles Kastigar, to be in civil contempt and ordering them confined. The order was entered pursuant to Section 301(a) of the Organized Crime Control Act of 1970, 28 U.S.C. § 1826, when appellants refused to answer questions before a grand jury after having been granted immunity under Section 201(a) of that Act. 18 U.S.C. § 6002. Because the statute pursuant to which this appeal was taken requires that the appeal be disposed of not later than thirty days from its filing, the unpublished order affirming the judgment of the district court was entered and filed on March 10, 1971, with the notation that this opinion of the panel was to follow.

Appellants' difficulties stem from the fact that each of them refused to answer questions put to him by the federal grand jury after an order granting immunity

under 18 U.S.C. § 6001 *et seq.* had been obtained for each. They claim the shelter of the Fifth [1] Amendment privilege against self-incrimination. They also assert that the summary procedure provided by 28 U.S.C. § 1826 denies them due process of law.

SELF-INCRIMINATION

Appellants' argue that the immunity provision of the Act[1] affords only a "use immunity." That is, that the answers may be compelled if there is immunity only from federal and state *use* of such testimony in connection with a criminal prosecution against the person testifying. This, they urge, does not satisfy the requirements of the Fifth Amendment or the cases interpreting it, particularly *Counselman v. Hitchcock,* 142 U.S. 547 (1892). Appellants insist that the Constitution requires that for a statute granting immunity to be valid it must afford complete and absolute immunity provided by the Fifth Amendment.[2]

This is accomplished, they assert, only where the witness is accorded "transactional immunity" under the appropriate statute. *Cf. Ullman v. United States,* 350

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[1]Section 201(a) of the Organized Crime Control Act of 1970, 18 U.S.C. 6002, provides as follows:

"[T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; *but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness* in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

[2]"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

Although these cases arise in the context of a federal immunity statute, it seems clear that the validity of a state immunity statute is measured by the same yardstick. *See Malloy v. Hogan,* 378 U.S. 1 (1964).

U.S. 422 (1956); *Brown v. Walker,* 161 U.S. 591 (1896).[3]

There appears to be no question but that a "transaction" statute affords the protection that the Fifth Amendment requires. Here [2] we examine a different statute to determine whether it also may be constitutional. We find that it is.

No case has been cited in which the Supreme Court has held that *only* a transaction statute will suffice, and we have found none. On the contrary, it appears that *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52 (1964), has decided the issue here both with respect to the scope of *Counselman* and also with respect to the extent of the requirements of the Fifth Amendment—ast least as the latter apply here.

Murphy was decided on the same day as *Malloy v. Hogan,* 378 U.S. 1 (1964). *Malloy* held that the Fourteenth Amendment prohibits state infringement of the privilege against self-incrimination just as the Fifth Amendment prohibits the federal government from denying the privilege. *Murphy* decided a related question: Whether one jurisdiction within the federal structure could compel a witness to whom it had granted immunity to give testimony which might then be used to convict him of a crime against another jurisdiction. In the case under consideration here, of course, the

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[3]A typical "transaction" statute is the one held sufficient in *Ullman.* It provides in pertinent part:

> "But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing against self-incrimination, to testify or produce evidence. Nor shall testimony so compelled be used as evidence in any criminal proceeding concerning which he is compelled, after having claimed his privilege . . . against him in any court." 350 U.S. at 424.

issue is one of compulsion to testify before a federal grand jury investigating possible violations of the laws of the United States, after having received immunity under the federal statute.[4] In *Murphy* the Court considered *Counselman* and then stated the rule to be:

> "[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U.S. at 79.

The Court added this significant footnote:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U.S. at 79 n.18.

It seems apparent from this footnote that the Court does not believe that the immunized testimony must bar all *prosecution* for the "transaction" about which he testified. Rather, the Court makes [3] clear that any evidence used must be free from all taint of compulsion. There must be an "independent legitimate source" for it other than from that evidence produced by the witness under compulsion and its fruits.[5]

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[4] *Supra*, footnote 1.

[5] Such a construction is consistent with the rule governing the admissibility of evidence charged to have been obtained by illegal search and seizure in violation of the Fourth Amendment. *Wong Sun v. United States*, 371 U.S. 471 (1963).

Mr. Justice White in his concurring opinion voiced the views that are urged by the appellee and those views would sustain the statute under attack here. *Murphy, supra,* 378 U.S. at 100-07. That a prosecution need not be foreclosed which arises out of any "transaction" to which the witness alludes, is inherent in his statement:

> "In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation . . . . It is precisely this possibility of a prosecution based on untainted evidence that we must recognize." 378 U.S. at 106.

The statute now under question appears clearly within the protective limitations of the Fifth Amendment as construed by *Murphy*. It proscribes the use of the testimony "or other information" compelled, together with "any information directly or indirectly derived from such testimony or other information." *See also Zicarelli v. New Jersey State Commission of Investigation,* 55 N.J. 249 (1970); 261 A.2d 129, 137-40 (1970), *Prob. juris. noted,* 39 U.S. L.W. 3375 (U.S. March 2, 1971) (No. 91).

DUE PROCESS

Appellants, in addition, urge that 18 U.S.C. § 6002-03 and 28 U.S.C. § 1826, impose a summary procedure upon them which denies them fundamental notice and a fair hearing required by the due process requirements of the Fifth Amendment.

The appellants were not parties to any judicial proceeding. They were witnesses called upon to give evi-

dence, if any they had, of possible violations of the laws of the United States. They were appearing under subpoena. The record discloses that their counsel was available to advise them. Their contentiion, therefore, based upon due process is without merit. *United States v. Weinberg,* F.2d (9th Cir. Jan. 18, 1971).

The judgment of the district court is affirmed. [4]

Supreme Court of the United States, Office of the Clerk, Washington, D.C. 20543.

E. ROBERT SEAVER
Clerk of the Court

May 17, 1971

Hugh R. Manes, Esq.
3440 Wilshire Boulevard
Suite 608
Los Angeles, California 90010

RE: KASTIGAR v. UNITED STATES
No. 1562, O.T. 1970

Dear Mr. Manes:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed is a memorandum describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

E. ROBERT SEAVER, Clerk
By /s/ Helen K. Loughran
(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Enclosures

cc: Margolis, McTernan, Smith,
Scope & Herring
3325 Wilshire Boulevard
Suite 901
Los Angeles, Calif. 90010

Supreme Court of the United States

No. 1562 ----, *October Term, 19* 70

Charles Joseph Kastigar and Michael Gorean Stewart,

Petitioners,

v.

United States

ORDER ALLOWING CERTIORARI. Filed May 17 ---------- , 19 71.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- Circuit is granted.

May 17, 1971